

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

FILED

JUL 12 2004

LARRY W. PROPPS, CLERK
CHARLESTON, SC

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| JOSE PADILLA |) | C/A No. 2:04-2221-26AJ |
| |) | |
| Petitioner, |) | Affirmation of ANDREW G. PATEL and |
| |) | Memorandum of Law in support of |
| vs. |) | Petitioner's motion for continuation and |
| |) | appointment of counsel |
| COMMANDER C.T. HANFT, USN |) | |
| Commander, Consolidated Naval Brig |) | |
| |) | |
| Respondent, |) | |

ANDREW G. PATEL, ESQ., an attorney duly admitted to practice law before the bar of the State of New York, affirms, under penalties of perjury, that:

1. I am one of the attorneys of record for Jose Padilla, the Petitioner herein, my office is located at 111 Broadway, 13th Floor, New York, New York 10006, and I am fully familiar with the facts and circumstances herein.
2. I am in good standing as a member of the bar of the State of New York. I am also admitted to practice law in the United States District Court for the Southern District of New York and I am a member of the bar of the United States Supreme Court. On information and belief, Donna R. Newman is a member in good standing of the bar of the State of New York and is also admitted to practice law in the United States District Court for the Southern District of New York and is a member of the bar of the United States Supreme Court.
3. In the event that Mr. Padilla's application is granted, Mr. Michael P. O'Connell, Esq., of Charleston, South Carolina has agreed to act as local counsel so that Ms. Newman and I can appear in accordance with Local Rule 83.1.05.

4. On or about May 15, 2002, the Honorable Michael B. Mukasey, Chief Judge of the United States District Court for the Southern District of New York, assigned Donna R. Newman, Esq., pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, to represent Mr. Padilla, who was then detained as a material witness for a grand jury in the Southern District of New York.
5. On June 9, 2002, the President of the United States signed an order declaring Mr. Padilla to be an “enemy combatant” and further ordering that he be detained by the Department of Defense.
6. On June 11, 2002, acting as Mr. Padilla’s next friend, Ms. Newman filed a Writ of Habeas Corpus in the Southern District of New York.
7. On June 11, 2002, Chief Judge Mukasey assigned both Ms. Newman and me to represent Mr. Padilla on the previously filed Writ of Habeas Corpus. These assignments were made pursuant to the Criminal Justice Act, 18 U.S.C. 3006A(2)(B).
8. Ms. Newman and I filed numerous briefs during the extensive litigation on the Writ before Chief Judge Mukasey. Chief Judge Mukasey issued a series of opinions resolving a number of issues raised in the litigation.¹ Chief Judge Mukasey found that the Writ was properly filed in the Southern District of New York, that the President has the authority to order the military detention of a United States citizen and that a citizen would have the right to have access to counsel to contest the President’s determination before a court. The government sought an interlocutory appeal to the United States Court of Appeals for the Second Circuit.
9. Our representation of Mr. Padilla continued before the Second Circuit where a divided panel of the Court reversed Judge Mukasey. *See, Padilla v Rumsfeld*, 352 F.3d 695 (2d Cir. 2003). The majority of the Court held that the President does not have the authority to order the military detention of a civilian American citizen. The Second Circuit unanimously held that the Writ had been properly filed in the Southern District of New York.

¹ *Padilla v. Bush*, 233 F.Supp.2d 564 (S.D.N.Y., Mukasey, C.J., Dec. 4, 2002); *Padilla v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y., Mukasey, C.J., March 11, 2003); *Padilla v. Rumsfeld*, 256 F. Supp. 2d 218 (S.D.N.Y., Mukasey, C.J., April 9, 2003).

10. The United States Supreme Court granted the government's application for a Writ of Certiorari. *See, Rumsfeld v. Padilla*, 124 S.Ct. 1353 (2004). Ms. Newman and I appeared for Mr. Padilla in the Supreme Court. On June 28, 2004, the Court held that Writ should have been filed in the District of South Carolina. *See, Rumsfeld v. Padilla*, __U.S.__, 2004 U.S. LEXIS 4759; 72 U.S.L.W. 4584.
11. The above three paragraphs give only the barest outline of this litigation. Over the past two years, Ms. Newman and I have spent thousands of hours researching and drafting legal memoranda on wide array of statutory [18 U.S.C. §4001(a), Authorization for Use of Military Force (115 Stat. 224.)], constitutional [War power, limits on Executive Authority, Separation of Powers, Suspension of the Writ of Habeas Corpus, Due Process, Right to Counsel], and international law issues [Geneva Conventions, Law of War, Prize Law, International Humanitarian Law]. Our representation of Padilla has required us to become knowledgeable on a numerous of historical events from the signing of the Magna Carta, the development of the Writ of Habeas Corpus both in the United States and in England, as well as incidents of executive authority in times of war.²
12. The core issues that were briefed on the Writ filed in the Southern District of New York will be raised in the Writ now pending in this Court. Continuing our representation of Mr. Padilla will avoid the need for new counsel to duplicate our learning curve of complex and unusual issues.
13. On or about February 11, 2004, the Department of Defense agreed, under highly restrictive conditions, to allow Ms. Newman and I to meet with Mr. Padilla. As a condition precedent to our meeting with Mr. Padilla, Ms. Newman and I underwent extensive background checks and received security clearances.

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We would be pleased to provided the Court with copies of the submissions made to Judge Mukasey. The briefs of the parties, amicus briefs and related submissions made to the Second Circuit and the Supreme Court are available at <http://www.wiggin.com/practices/areainfo.asp?groupid=5&areaID=231> Last accessed July 8, 2004.

14. Since March of this year, Ms. Newman and I have been able to meet Mr. Padilla. While not free of all restrictions, the Department of Defense has recently permitted us to have a number of unmonitored meetings with Mr. Padilla. The unmonitored conferences have permitted us to develop an attorney-client relationship with Mr. Padilla.
15. During the course of this litigation, Ms. Newman and I have had numerous conferences with Mr. Padilla's family. We have developed a good working relationship with Mr. Padilla's family.
16. In addition to the work I have done on Mr. Padilla's behalf, I have extensive experience as a trial lawyer in this field. I was assigned pursuant to the Criminal Justice Act to represent El-Sayyid Nosair in the matter United States v. Omar Abdel Rahman, 93 Cr. 181 (MBM). That matter involved a 10 month trial of members of an Islamic terrorist organization on charges of seditious conspiracy, making war on the United States. Since that trial, I have maintained files concerning criminal proceedings against alleged terrorists, including members and associates of al Qaeda.

Memorandum of Law

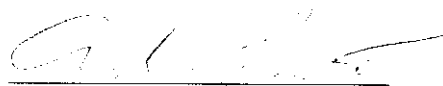
1. The writ of habeas corpus that was filed in the Southern District of New York raised numerous complex issues. Many of those issues will now be addressed to this Court.
2. A Petitioner on a writ of habeas corpus does not have right to counsel, but 18 U.S.C. § 3006A (2)(B) permits counsel to be assigned to a Petitioner who has filed a writ pursuant to 28 U.S.C. § 2241, when "the interests of justice so require." Due to the complexity of this matter, Chief Judge Mukasey found it appropriate to assign two counsel to represent Mr. Padilla. *See, Padilla v. Bush*, 233 F.Supp.2d 564, 600 (S.D.N.Y., Mukasey, C.J., 2002).
3. The government was represented before Chief Judge Mukasey by the Office of the United States Attorney for the Southern District of New York and by the Solicitor General's Office. Additionally, counsel from the Department of Defense appeared before Chief Judge Mukasey.

4. As Mr. Padilla states in his attached affidavit, he is indigent and does not have funds to retain counsel.
5. Mr. Padilla has requested that counsel continue to represent him. It is respectfully submitted that the complexity of this matter demonstrates his need for counsel.
6. During the two years that we have represented Mr. Padilla, Ms. Newman and I have developed expertise in many arcane areas of law that are relevant to this matter. Additionally, we have already obtained the required security clearances needed to consult with Mr. Padilla and we have formed an attorney-client relationship with him..
7. As discussed above, assignment of counsel is discretionary with this Court. However, in *Hamdi v. Rumsfeld*, 542 U.S. __ (2004), Justice O'Connor's plurality opinion held that Mr. Hamdi "unquestionably has the right to access to counsel in connection with the proceedings on remand. (Bench opinion page 32).
8. The Court's decision in *Hamdi* may not resolve the issues before this Court but we respectfully submit that the Court's determination that Mr. Hamdi is entitled to counsel on remand provides yet another persuasive reason for the Court to exercise its discretion to permit the continuation of counsel.

WHEREFORE, based on the foregoing, it is respectfully requested that this Court grant the application of Jose Padilla by entering an Order appointing Donna R. Newman and Andrew G. Patel to continue to represent Jose Padilla pursuant to the Criminal Justice Act.

Dated: New York, New York
July 10, 2004

Respectfully submitted,



Andrew G. Patel, Esq.